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January 27, 2014

Hon. A. Kathleen Tomlinson Magistrate Judge United States District Court 100 Federal Plaza Courtroom 910 P.O. Box 9014 Central Islip, NY 11722-9014 Chambers: (631) 712-5760

Re: Genometrica et ano v. Gorfinkel et al Case# 11-CV-5802 - (PKC) (AKT)

Courtesy copies of Defendants' ECF filed (i) Responsive List to Plaintiffs' claimed deficiencies and (ii) Defendants own list of Deficiencies from Plaintiffs Failure to Respond And 230 Pages and 500 Pages of Material Provided in CD Format by Mr. Bernstein

Dear Judge Tomlinson:

I am counsel to defendants in this case under Case# 11-CV 5802-(PKC) (AKT). In a separate Binder defendants provide two (2) courtesy copies of Defendants' ECF filed:

- (i) Defendants' Responsive List to Plaintiffs' claimed deficiencies; and
- (ii) Defendants own list of Deficiencies from Plaintiffs Failure to Respond The first binder contains the 230 Pages provided by Mr. Bernstein plus an analysis of the contents of those 230 pages.

The Second Binder contains the 500 pages also provided by Mr. Bernstein. Defendants' Discovery Counsel Gregory Koerner provided Your Honor on January 10, 2014 (Docket #89) with an analysis of those 500 pages plus declarations. He wrote: 'Bulk of 500 pages are Agreements with SUNY (RF) which were not demanded. The Subpoenas primarily sought documents concerning case#13-cv-3093(PKC)(AKT), specifically documents relating to SUNY(RF) determination that no patent infringement occurred (12/01/11 to 12/09/11) and false Complaint of Conflict of Interest against Dr. Gorfinkel (12/16/11 through 7/01/12.

The complete letter (Doc.89) and supporting Exhibits (Docs.89-l, 89-2, 89-3) evidence the inadequacy of the 500 pages to the 17 Demands in the Subpoena are annexed hereto for ready reference.

Respectfully submitted,

Arthur Morrisøn

Encls. The complete letter (Doc.89) and supporting Exhibits (Docs.89-1, 89-2, 89-3)

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January 10, 2014

Honorable A. Kathleen Tomlinson United States District Court, Eastern District of New York 100 Federal Plaza, Courtroom 910 P.O. Box 9014 Central Islip, NY 11722-9014

Re: Genometrica Research, Inc. v. Gorbovitsky, et al. Case No.: 11-cv-05802 (ADS) (AKT)

Dear Judge Tomlinson:

I am Discovery Counsel for Ms. Gorfinkel in both cases enumerated above and provide a response to the letter of Peter I. Bernstein, Esq. dated December 24th, 2013.

Ms. Gorfinkel provides her own Declaration annexed hereto plus Exhibits as she personally dealt with Mr. Bernstein during the period in question, December 1, 2011 through July 1, 2012. Documents from said period are being sought in both cases.

As per Ms. Gorfinkel's Declaration, during the above referenced six (6) month period, Mr. Bernstein and his colleague Dr. Park individually and jointly took testimony from Ms. Gorfinkel and her husband, Boris Gorbovitski. Additionally, Mr. Bernstein and/or Dr. Park attended meetings with Nancy Daneau, of the SUNY Research Foundation, wherein notes were taken.

Ms. Gorfinkel has been a tenured Professor at the University for 15 years and operates a lab which conducts world famous research. Ms. Gorfinkel is familiar with the protocols and procedures for SUNY(RF) record keeping.

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The occurrences outlined herein cover the period from December 1st, 2011 through July 1st, 2012:

- (a) Complaint by Genometrica of Patent Infringement (12/05/11) and total rejection of Infringement Complaint by Peter Bernstein with Report in writing by Nancy Daneau of Peter Bernstein's findings on 12/09/11;
- (b) Complaint by Genometrica against Vera Gorfinkel of Conflict of Interest (12/16/11 Nancy Daneau's "Notice of Intent" to cancel ABBM contract of \$1.4 Million and shut down her Lab); and
- (c) Decision by Nancy Daneau based upon evidence adduced (12/16/11 to 1/16/12) to shut Down Lab on 1/17/12 and terminate ABBM Research by Vera Gorfinkel with "Letter of Termination";
- (d) Investigation and evaluation from 1/17/12 onward by Peter Bernstein of 100,000 pages of Genometrica Research for period from 2008 through Formal Report to Foundation of December, 2011 and ABBM Research Reports to NIH/NIC on file with University Covering period from 2009 through Nancy Daneau's 1/17/12 "Letter of Termination" to determine if Conflict tofu Interest Occurred; and
- (e) Investigation of Genometrica's offer by its attorney Klein to Nancy Dane au to extend the Genometrica Research Project beyond December 31, 2011 for another lengthy period subject to the removal of Dr. Gorfinkel as Principal Investigator which offer was withdrawn when Peter Bernstein made a determination, reported to the Foundation that no "Conflict of Interest" had occurred and the Genometrica complaint dating back to 12/05/11.

Ms. Gorfinkel has the best knowledge of the shortcomings of the documents provided by Mr. Bernstein on behalf of SUNY(RF), see Ms. Gorfinkel's Declaration hereto as Exhibit A and based upon her review of Peter Bernstein's responses of 10/16/13 and 12/3/13 to the subpoenas of this office dated September 30th, 2013.

Of the approximately 500 pages provided on 10/16/13 and 12/23/13, Professor Gorfinkel avers only 40 pages are possibly relevant¹ with 14 pages marked "Confidential". They were omitted from the earlier "Privilege Log" of 10/16/13 without explanation for such omission. Being at all times in the Foundation's possession, those 14 pages now referenced as "Confidential" must be produced as a waiver of Privilege occurred from non-inclusion in "Privilege Log". Of the balance of 26 documents (from the 40 in the disc of 500) with no explanation why they were not produced earlier a good faith basis existed for an extension request. Stated simply by Dr. Gorfinkel, there are six months of documents in the possession the foundation, few were produced.

Conclusion

¹ Bulk of 500 pages are Agreements with SUNY(RF) which were not demanded. The Subpoenas primarily sought documents concerning case#13-cv-3093(PKC)(AKT), specifically documents relating to SUNY(RF) determination that no patent infringement occurred (12/01/11 to 12/09/11) and false Complaint of Conflict of Interest against Dr. Gorfinkel (12/16/11 through 7/01/12).

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Professor Gorfinkel's annexed declaration avers that she is familiar with the procedures and protocols of SUNY(RF), wherein six months of fact finding occurred between December 1, 2011 and July 1, 2002; therefore documentation exists at the University level that no Patent Infringement occurred, further no "Conflict of Interest" occurred by Vera Gorfinkel covering the period of the Genometrica Research during 2008 through December 31, 2011 (100,000 pages of Research) and the ABMM Research for the period 2009 through the Termination of its Research Contract with SUNY(RF) by Nancy Daneau on January 17, 2012

Mr. Bernstein has declined to produce all of the Foundation's records for both these significant events.²

Our office is preparing a motion for Contempt as suggested by this Court and will file same prior to the hearing date of January 27th..

A good faith basis existed for the Application to the Court for an extension granted to January 27, 2014 based upon the information provided by Professor Gorfinkel, who was present during these events described above and has examined the few documents produced over a six month history of events at SUNY(RF), supervised by Mr. Bernstein,

Respectfully submitted,

/s/Gregory Koerner Gregory Koerner

CC: Arthur Morrison, Esq., via ECF William V. Rapp, Esq., via ECF Betty Tufariello, Esq., via ECF Nicolas Malito, Esq., via ECF Peter I. Bernstein, Esq., via email

² As SUNY(RF) is a party plaintiff to case #11-cv-5802(PKC) (AKT) and a party is subject to Discovery, with Mr. Bernstein being the primary source of providing documents of recommendations of non- patent infringement and non "Conflict of Interest" which were put in place by SUNY(RF) between 12/01/11 and 7/01/12, the Court is asked to consider permitting a deposition of Mr. Bernstein including detailed Document Demands

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

VERA GORFINKEL,

Case No.: 13-cv-3093 (JFB) (AKT)

Plaintiff,

Against

RALF VAYNTRUB, INVAR CONSULTING LTD., GENOMETRICA LTD. and GENOMETRICA RESEARCH, INC.

Defendants.	

VERA GORFINKEL'S DECLARATION TO RESPOND TO JUDGE TOMLINSON BY JANUARY 10, 2014 REGARDING PETER I. BERNSTEIN, ESQ., LETTER TO COURT

VERA GORFINKEL declares the following to be true, accurate and complete under the penalty of perjury:

(1) She is the plaintiff in this suit and has personal knowledge of events that occurred in the within litigation among all of the defendants named above and makes this declaration in response to Judge Tomlinson's

Request for a response to Peter I. Bernstein's letter to the Court

This declaration covers period of time from 12/1/2011 through 7/1/2012.

- (2) There are three distinct time frames in this case where documentation is requested.
 - a) December 1, 2011 through December 9, 2011 (Genometrica claim of Patent Infringement;
 - b) December 16, 2011 to January 17, 2012 (30 day period of notification of intention by SUNY(RF) to terminate ABMM research contract at Vera Gorfinkel's Lab where since 2009 she was Principal Investigator (PI);
 - c) January 17, 2011 through July 1, 2012 ($5\frac{1}{2}$ month period wherein Peter I. Bernstein and his law firm investigated charges in SUNY (RF's) January 17, 2012 Letter of Termination of ABMM Research project at the Foundation, charges brought by Genometrica of "Conflict of

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Interest" that Vera Gorfinkel misappropriated Genometrica Research in her Lab at SUNY (RF) occurring between 2008 and her final report in October, 2011 to benefit her husband's ABMM Research also occurring between 2009 and 2011 at SUNY (RF).

- (3) During the period from 12/1/2011 through 7/1/2012, defendants, their legal counsels (Mr. Klein, Ms. Tuffariello) and the parties themselves for seven (7) months had extensive contacts with Mrs. Nancy Daneau, Deputy Vice President for Research of the RF SUNY at Stony Brook and Peter I. Bernstein, Esq., (outside counsel for the RF SUNY) and exchanged a large number of documents e.g. e-mails, letters, memoranda, and similar related documents to resolve the formal complaints raised by Genometrica to the University against Vera Gorfinkel, Boris Gorbovitski and ABMM as follows:
 - a) December 1, 2011 through December 9, 2011 (Genometrica claim of Patent Infringement;
 - b) December 16, 2011 to January 17, 2012 (30 day period of notification of intention by SUNY(RF) to terminate ABMM research contract at Vera Gorfinkel's Lab where since 2009 she was Principal Investigator (PI);
 - January 17, 2011 through July 1, 2012 ($5\frac{1}{2}$ month period wherein Peter I. Bernstein and his law firm investigated charges in SUNY (RF's) January 15, 2012 Letter of Termination of ABMM Research project at the Foundation.

Demands for seven (7) months' of documents as evidence is material and necessary to the prosecution of this case and is necessary discovery of Genometrica's actions which caused substantial damages to Prof. Garfunkel

Background

Research conducted by Prof. Vera Gorfinkel at the RF SUNY

Different Research for Genometrica and ABMM

(4) Deponent is an Associate Professor in the Department of Electrical and Computer Engineering ("Department") located at Light Engineering Building, Stony Brook University, Stony Brook, New York 11794-2350 and her work there began in 1996. At the Department deponent supervises a Research Lab, the Fluorescence Detection Lab which is involved in design, development, implementation, and testing of various instruments for Life Sciences.

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- (5) Since 1996 deponent completed a substantial number of research grants at her Fluorescence Detection Lab located at Stony Brook received from The National Institutes of Health (NIH) totaling approximately \$18.3 Million, out of which almost \$1.4 Million were granted by National Cancer Institute (NCI) as a subcontract to NCI's Grants Award to ABMM Inc. Additionally deponent at her Fluorescence Detection Lab completed two research projects sponsored by Biophotonics Corp. (aka Genometrica) totaling approximately \$2.7 Million.
- (6) The research project conducted for Genometrica targeted creation of innovative technology for next generation DNA sequencing. Within the same project Lab of Prof. Gorfinkel made a number of improvements to an old DNA sequencing technology (DNA sequencing by capillary electrophoresis), which was developed in Prof. Gorfinkel's Lab under NIH funding in the period from 1996 through 2000 and published in 2002¹.
- (7) The research project conducted for the NCI/NIH under ABMM subcontract was different from Genometrica's research. The project targeted development of the innovative technology for whole genome detection of Copy Number Variations (CNVs). The technology which was developed under the project did not involve any DNA sequencing and functioned on essentially different principle.
- (8) The Research conducted by Prof. Gorfinkel at her Fluorescence Detection Lab is world recognized. She has published numerous papers in reference journals, presented multiple presentations at various scholarly conferences both in the United States and Europe, and created multiple inventions.

Chronology of events for the period from 12/1/2011 through 7/1/2012

Event	Document
11/29/2011	Document produced by RF
Unsolicited e-mail from Mr. Klein to Ms. Daneau with copy of the filing	SUNY
by Genometrica a lawsuit against Vera Gorfinkel, Boris Gorbovitski,	
Advanced Biomedical Machines (ABMM).	
No patent infringement was claimed at that time.	
12/1/2011	Document subpoenaed on
N. Daneau, A. Vayntrub and M. Labunskaya (Genometrica Res.	9/30/2013m
Inc.), B. Tufariello and R. Klein (Genometrica's counsels)	NOT produced.
Meeting of Genometrica with RF SUNY and letter from R. Klein where	_

¹ L. Alaverdian et.al "A family of novel DNA sequencing instruments," *Electrophoresis*, Vol.23, 16, 2002, 2804-2817.

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Genometrica asks RF SUNY to waive written notice Genometrica is required to give to it under Section 7.1 of the July 1, 1999 License Agreement between Genometrica and the Foundation (the "License Agreement") relating to alleged infringement and to agree that Genometrica has provided the Foundation with satisfactory evidence thereof and (2) to waive its rights under Section 7.2 thereof (x) to try to persuade the alleged infringers to desist and (y) to prosecute its own infringement action and, in connection therewith, to confirm to Genometrica the Foundation's intent not to bring action against the alleged infringers. (*RF SUNY was not plaintiff at that time*)

The document was ECF filed by Genometrica with Court and can be found in the USDC:EDNY file: Case No. 11-cv-05802 (ADS)(AKT)
"27-14" Filed 5/07/12

12/5/2011

B. Tufariello, R. Klein

E-mail from Richard Klein to Peter Bernstein (with Attachment) and related correspondence between and the RF SUNY SB (N. Daneau).

Note

In Summer (July) of 2013 V. Gorfinkel had a phone conversation with Mr. Bernstein. She told him that she knew of a Memo of Law which Genometrica provided to RF SUNY on 12/05/11, where it alleged patent infringement which was rejected by Mr. Bernstein in communications to Ms. Daneau finding on 12/09/11 non-infringement in writing. Vera said that she knew of the existence of that document from materials ECF filed by Genometrica. To that Mr. Bernstein responded he agreed he made a finding of non-infringement but that Genometrica should not have ECF filed that disclosure of non-infringement but did so, further that he could not give the Memo without a Subpoena.

12/5/2011, 12/6/2011, 12/8/2011

E-mails from Genometrica (R. Klein) to RF SUNY (N. Daneau) regarding continuation of Genometrica's research project (promised budget \$300,000 and later increased to \$350,000 for 6 months). Conditions for initiation of the project were: (i) to replace Prof. Gorfinkel and make Dr. Gouzman PI on the project and (ii) to transfer Prof. Gorfinkel's lab (staff and equipment) to supervision of Dr. Gouzman. By this time Prof. Gorfinkel's lab for already 5 months had been working 100% on ABMM's research project.

12/9/2011

E-mail from RF to Genometrica stating that "...Peter Bernstein and his colleagues at Scully, Scott, Murphy & Presser, outside counsel to the Research Foundation (RF), have reviewed the materials you and Betty provided to his office on December 5 on an "Attorneys Eyes Only" basis arising from the Complaint filed by Genometrica. The complaint refers to a license agreement between the RF and Advanced Biomedical Machines (ABMM). To my knowledge, the RF has not entered into any license

Document subpoenaed on 9/30/2013, NOT produced.

The document in part was ECF filed by Genometrica with Court and can be found in the USDC:EDNY file:
Case No. 11-cv-05802
(ADS)(AKT)

"27-15" Filed 5/07/12 Memo of Law by Atty. B. Tuffariello not filed.

Documents subpoenaed on 9/30/2013, Produced.

Labeled "CONFIDENTIAL" by the P. Bernstein

Document subpoenaed on 9/30/2013, NOT produced.

Document was ECF filed by Genometrica with Court and can be found in the USDC:EDNY file: Case 2:11-cv-05802-PKC-AKT Document 89-1 Filed 01/10/14 Page 5 of 10 PageID #: 1541 Case No.: 13-cv-3093 (JFB) (AKT)

agreement with ABMM.

Furthermore, according to Peter, there is no definitive information that ABMM has, in fact, made or sold any device. Therefore, Is not possible, at this time, for the RF to determine a basis for infringement of RF patents. While Genometrica's assertions remain of concern to the RF, given the lack of evidence provided to the RF, we are not in a position to pursue infringement or other claims and therefore do not waive our rights under section 7.2 of the license agreement executed between the RF and Biophotonlcs Corporation on July 1, 1999."

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12/16/2011

RF SYNY

V. Gorfinkel, B. Gorbovitski, N. Daneau

E-mails from N. Daneau to B. Gorbovitski and V. Gorfinkel with Notice of Intent to Terminate ABMM's Research Agreement with RF SUNY

Plaintiff and B. Gorbovitski need documents from 12/01/11 to 12/16/11 wherein Genometrica provided documents of "Conflict of Interest" against Vera as Lab "PI" for period from 2008 though 12/31/11

(A) On 12/16/2011 RF SUNY decided to investigate if "Conflict of Interest" charges brought by Genometrica against Vera Gorfinkel were sufficiently proven to terminate the \$1.4 Million Research Agreement with ABMM (Principal Investigator Prof. Gorfinkel) and issued the "30 Day Notice of Intent to Terminate" on 12.16/2011 but provided no documentation in the Subpoena of 9/30/2013 what evidence it had in its possession provided to the RF SUNY by Genometrica between 12/01/2011 and 12/16/2011 to permit RF SUNY to have sufficient evidence to conclude it intended to terminate the ABMM Research Project and would swerve the "30 Day Notice of Intent to Terminate on 12.16/2011".

No documents provided by RF SUNY under 9/30/13 Subpoena for that period of time (12/01/2011 to 12/16/2011) which would constitute a basis for RF's intent to terminate the Agreement with ABMM).

- (B) On January 17, 2012 Nancy Daneau did in fact "Terminate the ABMM Research Contract". No documents provided by RF SUNY under 9/30/13 Subpoena for that period of time (12/16/11 to 1/17/2012) which would constitute a basis for RF's actually terminating the Agreement with ABMM).
- (C) Between January 17, 2012 (Termination of ABBM Contract) and July 1, 2012 (Restoration of Vera Gorfinkel to her Lab and withdrawal of 1/17/2012 "Termination Letter") Peter Bernstein and his colleagues had conducted an exhaustive investigation of Genometrica's "Conflict of Interest" charges against Vera Gorfinkel calling witnesses with his law firm colleague Dr. Park an investigation occurring over a period of five and a half $(5\frac{1}{2})$ months.

Nancy Daneau informed Prof. Gorfinkel Peter Bernstein and his law firm colleagues had

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investigated the Charges against her by Genometrica carefully and made a written report to RF SUNY of no evidence of "Conflict of Interest" allowing Nancy Danaeu to cancel the January 17, 2012 "Termination Letter".

No documents provided by RF SUNY under 9/30/13 Subpoena for that period of time (1/17/2012 to 7/01/2012) which would constitute a basis for RF's actually determining no "Conflict of Interest" existed dating back to December 16, 2011 and permitting cancellation of the Termination Letter of January 17, 2012 and allowing the Research Project of ABMM to continue in Vera Garfunkel's Lab.

1/4/2012

RF SYNY, Stony Brook,

N. Daneau, V. Gorfinkel, B. Gorbovitski,

On 1/4/2012 B. Gorbovitski and V. Gorfinkel meet with Nancy Daneau at her office at RF. Vera and Boris brought copies of the complete proposal submitted by ABMM and funded by the NIH under which the RF is performing a portion of the work scope with Dr. Gorfinkel as the PI for the subcontract. Vera and Boris assured Ms. Daneau that there were no any patent applications filed by ABMM as well as no license agreements as well as no ABMM's representations about licensing technology from the RF.

Document subpoenaed on 9/30/2013, Produced but Labeled

Produced but Labeled "Confidential" by Mr. Bernstein.

Notes of N. Daneau on the meeting with V. Gorfinkel and B. Gorbovitski

Week of 1/16/2011

RF SUNY, Stony Brook

V. Gorfinkel, B. Gorbovitski, N. Daneau, Bernstein, B. Park

Meeting at RF SUNY, Stony Brook with Messrs. Bernstein and Dr.Park

At this meeting Mr. P. Bernstein and Mr. B. Park brought copies of all patents which were licensed to Genometrica under the License Agreement. Dr. Gorfinkel and Dr. Gorbovitski brought to the meeting the description of the system for whole-genome detection of copy number variations (CNV). During the meeting Mr. P. Bernstein and Dr. B. Park conducted a detailed comparison of the ABMM's CNV detection method with claims of all patents licensed to Genometrica.

Documents subpoenaed on 9/30/2013, NOT produced.

1/17/2012

E-mail from N. Daneau to B. Gorbovitski with Notice of Termination of ABMM's Research Agreement with RF SUNY

Document exists

Plaintiff and B. Gorbovitski already had this document. Labeled "Confidential"

by P. Bernstein

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	T
Week of January 16 th and January 26 th , 2012 E-mail correspondence between B. Gorbovitski and P. Bernstein regarding the Meeting of the week or January 16, 2012	Documents subpoenaed on 9/30/2013, Partially produced. (B. Gorbovitski already had these e-mails) Labeled "AEO" by P. Bernstein
3/13/2012	Document provided by RF
E-mail and letter from R. Klein to N. Daneau. which informs the RF that "GRI has given due consideration to the Foundation's acts and omissions under the Research Agreement, as amended, which expired on December 31, 2011, including for example its failure to deliver to GRI an intelligible, meaningful and useful Report which could be used as a basis for GRI to truly understand the past results and to develop future research goals so that researchers new to this device could work without having to surmount an overwhelming learning curve, which would be a considerable waste of GRI's time and money. Accordingly, GRI has determined that, under the circumstances and especially since the new Research Agreement would be for a term of only six months, it would be pointless and imprudent for GRI to proceed to negotiate such a new Agreement after the Foundation has explicitly advised GRI that the Foundation cannot agree to make available to GRI all of the personnel who performed the previous research under Dr. Vera Gorfinkel, individuals who, as GRI recently made crystal clear to the Foundation in our last meeting, are crucial to the successful development of its device	SUNY in response to Subpoena by Mr. Morrison of 10/8/2013. Labeled "AEO" by P. Bernstein
because of their vast and recent experience with the device's development". 3/31/2012 E-mail correspondence between P. Bernstein, V. Gorfinkel (with Questioner)	Documents subpoenaed on 9/30/2013, NOT produced. (V. already had these e-mails) Labeled "CONFIDENTIAL" by P.
	Bernstein
5/31/2012 through 6/6/2012 E-mail correspondence between N. Daneau and V. Gorfinkel regarding scope of work and availability of 32-channel detectors at Prof. Gorfinkel's Lab before 2008 (Before Genometrica's research project was given to the RF SUNY)	Documents subpoenaed on 9/30/2013, Produced Labeled "Confidential" by Mr. Bernstein (V. Gorfinkel already had these e-mails).
End of June –July 2012	Document exists and was not subpoenaed

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Reinstated Research Agreement between RF SUNY and ABMM	Plaintiff and B. Gorbovitski
The RF SUNY reinstated the Research Agreement with ABMM without a time gap with the start date of 1/18/2012.	already had this document

CONCLUSION

Reinstated Research Agreement between RF SUNY and ABMM

- (9) Declarant's attorney issued the Subpoena to obtain the evidence in RF SUNY's possession that after conducting its own investigation, headed by Nancy Daneau and Peter Bernstein the Foundation determined that (i) ABMM did have rights to receive the grant from the NIH (while BioPhotonics (Genometrica) did not), that (ii) that neither Prof. Gorfinkel nor ABMM or Dr. Gorbovitski infringed RF's intellectual property, and (iii) that there was no conflict of interest of Prof. Gorfinkel as PI on sponsored research projects from ABMM and Genometrica.
- (10) As a result of its extensive investigations RF SUNY reinstated fully Research Agreement between ABMM and the RF SUNY without a time gap with the start date of 1/18/2012.

Documents omitted in the RF SUNY's production of documents

- (11) There are huge gaps in the production of documents by the RF SUNY which covered the six (6) month period from December 1, 2011 through July 1, 2012. Indeed, during this period of time Declarant and her husband appeared and testified in person before Mr. Bernstein and Dr. Park on a number of occasions and in addition met with or spoke telephonically with Ms. Daneau and provided documentation of non-infringement and absence of "Conflict of Interest", which resulted in a finding of no Patent Infringement on December 9, 2011 by Mr. Bernstein and his law firm announced and reported by Nancy Daneau to all interested parties to the controversy, and no Conflict of Interest by Prof. Gorfinkel and re-installment of the Research Agreement with ABMM.
- (12) In her personal conversation with N. Daneau which occurred in April of 2012 at the RF premises (Melville Library, Grants Management, 5th floor), Declarant asked Ms. Daneau why it took so long for the RF to re-install the Agreement with ABMM. In response Ms. Daneau told that they conduct very thorough investigation and that that will be very helpful in the process-of Declarant's litigations with Genometrica. From the described conversation as well as from her knowledge regarding record keeping at the RF, Declarant infers that such a serious action as 6-months termination with further re-installment of the

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Research Agreement funded by the NIH in more than \$1M (9 researchers working on the project, all MS and PhD level) must be thoroughly documented.

(13) However, except of (i) handwritten notes of N. Daneau of the meeting with V. Gorfinkel and B. Gorbovitski on 1/4/2012; (ii) short follow-up e-mails after the meeting on the week of January 16th, 2012, and (iii) e-mail correspondence between N. Daneau and V. Gorfinkel on 5/31/2012 regarding scope of work and availability of 32-channel detectors at Prof. Gorfinkel's Lab before 2008, the RF SUNY did not produce any documentation which covers decision making process which occurred at the RF during the six (6) month period from December 1, 2011 through July 1, 2012.

Gaps in documents' production:

- (14) Out of documents and records covering the process of how "No Patent Infringement" decision had been made during the period from 12/1/2011 through 12/9/2011 missing is the following:
 - Memorandum of Law of12/5/2011 by B. Tuffariello;
 - P. Bernstein's conclusions and correspondence with N. Daneau regarding "No Infringement".
- (15) Out of documents and records covering the process of how "No Conflict of Interest" decision had been made during the period from 12/16/2011 through 7/1/2012 missing is the following:
 - Notes and conclusions of P. Bernstein and B. Park regarding the meeting of V. Gorfinkel and B. Gorbovitski with N. Daneau on 1/4/2012;
 - Notes and conclusions of P. Bernstein and B. Park regarding the meeting with V. Gorfinkel and B. Gorbovitski on the week of January 16th, 2012;
 - Records of communications between N. Daneau and P. Bernstein regarding the meeting with
 V. Gorfinkel and B. Gorbovitski on the week of January 16th, 2012;
 - Records of studies by P. Bernstein and N. Daneau of materials provided in the Final Report (the Report was provided by V. Gorfinkel to the RF SUNY on 10/12/2011) and in annual Progress Reports of ABMM to NCI/NIH, which the RF SUNY requested and received from ABMM.
 - Records of analysis and conclusion that there was no Conflict of Interest on Declarant's part between research conducted by Prof. Gorfinkel for Genometrica from July 2008 through June 2011 and for ABMM from September 2009 through July 2012, and that objectives,

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functionality, and technologies investigated in the two research projects were different and did not compete.

- E-mail correspondence regarding and analysis by P. Bernstein of the scope of work for ABMM subcontract provided to the RF by V. Gorfinkel in March, 12,
- Records of making decision to re-install the Research Agreement with ABMM.
- (16) Discovery counsel in my cases, Greg Koerner, Esq., was correct in seeking an adjournment of the Discovery Conference before Judge Tomlinson as most of the records adduced over six (6) months December 1,2011 (Patent Infringement Claim) and July 1, 2012 (when SUNY(RF) cancelled the Research "Termination Letter" have not been provided.
- (17) The reference to the 500 pages is irrelevant. I have reviewed the 500 pages (actually 423 pages) and only 40 pages of the entire 423 pages production have connection to the facts and details of the false Patent Infringement Claim and secondly the false "Conflict of Interest" complaint.
- (15) The reference in Mr. Bernstein's letter to 225 pages is mostly likewise irrelevant. Annexed as Exhibit "A" is an analysis of all documents production made by the RF SUNY on 10/16/13, 10/30/13, and 12/3/13.
- (16) Mr. Koerner's letter to the Court is totally factual and correct in seeking an adjournment granted to January 24, 2013 by consent of GenAmerica's counsel.

Wherefore declarant prays this Declaration be considered by Judge Tomlinson in the Court Ordered requested response for January 10, 2013.

I declare the foregoing to be true, accurate and complete under the penalty of perjury:

Dated: Stony Brook, New York January 9, 2013

VERA GORFINKEL

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EXHIBIT A

Analysis of documents provided by the RF SUNY on 10/30/2013 in response to Subpoena by Mr. A. Morrison of 10/8/2013

Case No. 11-cv-05802 (ADS) (AKT)

Case No. 11-cv-05802 (ADS) (AKT)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

GENOMETRICA RESEARCH INC., and THE RESEARCH FOUNDATION OF THE STATE UNIVERSITY OF NEW YORK (in accordance with Article VII of its Exclusive License Agreement dated as of July 1, 1999 with GENOMETRICA RESEARCH INC RESEARCH INC.), Case No. 11-cv-05802 (ADS) (AKT)

-against-

BORIS GORBOVITSKI, VERA GORBOVITSKI a/k/a VERA GORFINKEL, and ADVANCED BIOMEDICAL MACHINES INC.,

Defendants

Plaintiffs,

Analysis of documents provided by the RF SUNY on 10/30/2013 in response to Subpoena by Mr. A. Morrison of 10/8/2013

SUMMARY

Defendants' attorney on this case Mr. A. Morrison issued the above subpoena in order for Defendants to obtain information, which Defendants believe one plaintiff on this case (Genometrica) should have requested from another plaintiff on this case, The Research Foundation of SUNY (RF SUNY).

The subpoenaed documents were intended to cover 17 Requests for information (*Requests## 13, 14, 19, 20, 22, 24, 25, 29, 54, 56, 61, 62, 63, 71, 74, 93, 94*) presented by Plaintiff Genometrica in the course of the initial discovery.

In response to the above subpoena, the RF SUNY on 10/30/2013 provided 230 bate stamped pages of documents (pp. RFDN 000001 through RFDN 000230) and 23 pages of objections.

Case No. 11-cv-05802 (ADS) (AKT)

Defendants agree with multiple objections by Plaintiff RF SUNY, which characterizes literally every request as "...<u>overly broad, unduly burdensome and not reasonably calculated to lead to</u> the discovery of admissible evidence...".

- A. In its objections Plaintiff RF SUNY characterizes Requests##13, 19, 20, 71 and 93 as "...unanswerable by Plaintiff".
- **B.** Regarding **Request** #56 Plaintiff RF SUNY concluded that "... As presently drafted this request is virtually unintelligible and requires clarification to enable Plaintiff to attempt to locate responsive documents."
- C. Regarding Requests ## 22, 24, 25, 29, 54, 56, 61, 62, 63, 71, 74 and 94 Plaintiff RF SUNY noted that "...To the extent that this request is seeking the production of documents or information protected from discovery, Plaintiff will provide a Privilege log reflecting these documents or information in due course."
- **D.** In response to **Requests## 14, 22, 24, 25, 29, 54, 61, 62, 63, and 94** Plaintiff RF SUNY agreed that "... Subject to these and the foregoing general objections, after reasonable investigation, Plaintiff will produce any copies of any located, relevant and non-protected documents that are responsive to this request".

Unfortunately, it is impossible for Defendants to establish relevance of the provided 230 bate stamped pages to specific Requests presented in Subpoena of 10/8/2011 since none of the provided pages is related to any specific Request. Table 1 below presents brief description of the provided documents.

TABLE 1. 230 pages bate stamped from RFDN 000001 through RFDN 000230

Pages	Content	Relevance to Subpoena of 10/8/2011
RFDN 00001-000030	License Agreements between	Relevant Request # is NOT
	Genometrica and RF SUNY	Specified by the RF SUNY
RFDN 00031-	Research Agreements between	Relevant Request # is NOT

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000042, RFDN	the RFSUNY and BioPhotonics	Specified by the RF SUNY
00095-000192,	and ABMM	
RFDN 00195-000230		
RFDN 00042-000046	September 27, 2011	Relevant Request # is NOT
	Correspondence between the RF	Specified by the RF SUNY
	SUNY and Genometrica	
RFDN 00047-000087	Progress Report from ABMM to	Relevant Request # is NOT
	NIH	Specified by the RF SUNY
RFDN 00088-000096	Progress Report from the RF	Relevant Request # is NOT
	SUNY to Genometrica	Specified by the RF SUNY
RFDN 00193	Notice of intent to terminate	Relevant Request # is NOT
	ABMM subcontract to the RF	Specified by the RF SUNY
	SUNY	
RFDN 00194	Notice of termination of ABMM	Relevant Request # is NOT
	subcontract to the RF SUNY	Specified by the RF SUNY

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EXHIBIT B

Analysis of documents provided by the RF SUNY in response to Subpoena by Mr. G. Koerner of 9/30/2013

Case No.: 13-cv-3093 (JFB) (AKT)

Case No.: 13-ev-3093 (JFB) (AKT)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

VERA GORFINKEL,

Case No.: 13-cv-3093 (JFB) (AKT)

Plaintiff,

Against

RALF VAYNTRUB, INVAR CONSULTING LTD., GENOMETRICA LTD. and GENOMETRICA RESEARCH, INC.

Defendants.

Analysis of documents provided by the RF SUNY in response to Subpoena by Mr. G. Koerner of 9/30/2013

SUMMARY

Documents provided in response to Subpoena of by Mr. G. Koerner of 9/30/2013

As it is stated in the letter of 12/24/2013 by Mr. Bernstein to Hon. Judge Tomlinson, the documents were provided in two separate productions on 10/16/2013 and 12/3/2013 (total 423pages). Out of all provided bate stamped pages only **40** pages are relevant to the subpoenaed requests (pp. 000001-000016, 000022-000026, 000099-000104, 000105-000109, 000110-000111 and 000485-000490, (see Table 1 and Table 2 below).

Importantly, out of the **40** pages relevant to the subpoena, only **14** (fourteen) pages are marked "Confidential" by creators of the documents (pp. 000001, 000105-000109, 000110-000111, and 000485-000490). Simultaneously, Mr. P. Bernstein marked "Confidential" **22** (twenty two) pages (pp. 000001, 000002-000010, 000011-000016, 000099-000104), and "AEO" **18** (sixteen) pages (000022-000026, 000105-000109, 000110-000111, and 000485-000490).

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Table 1. First production of documents by the RF SUNY (10/16/2013) in response to Subpoena by Mr. Koerner of 9/30/2013

26 pages bate stamped from Foundation 000001 through Foundation 000022

Pages	Content	Relevance to
		Subpoena 9/30/2011
Foundation 000001	December 9, 2011	Relevant to Request
â	E-mail from N. Daneau to	#3 of the Subpoena
Page is labeled	Genometrica	of 9/30/2013.
"Confidential"	(e-mail is labeled " Confidential" by	Was ECF filed by
by P. Bernstein	N. Daneau)	Genometrica
		(Exhibit 16)
Foundation 000002- 000010	December 2011 E-mail	Relevant to Request
	correspondence of N. Daneau with	#4 of the Subpoena
Pages are labeled	Genometrica regarding Genometrica's	of 9/30/2013
"Confidential"	request to take from Prof. Gorfinkel	
by P. Bernstein	her Lab staff at equipment which were	
2.	100% employed on ABMM's project	
	since July 2011).	
Foundation 000011- 000016	January 4, 2012	Relevant to Request
Pages are labeled	Notes of N. Daneau on the meeting	#5 of the Subpoena
"Confidential"	with V. Gorfinkel and B. Gorbovitski	of 9/30/2013
by P. Bernstein	*	
Foundation 000017- 000018	December/16/2011	Not requested
	E-mail from N. Daneau to B.	Plaintiff and B.
Pages are labeled	Gorbovitski with Notice of intent to	Gorbovitski already
"Confidential"	terminate ABMM's Research	had this document.
by P. Bernstein	Agreement with RF SUNY	
Foundation 000019	January /17/2011	Not requested
	E-mail from N. Daneau to B.	Plaintiff and B.
Page is labeled	Gorbovitski with Notice of	Gorbovitski already
"Confidential"	Termination of ABMM's Research	had this document.
by P. Bernstein	Agreement with RF SUNY	
Foundation 000020 - 000021	December 2011-January 2012	Not requested
	E-mail correspondence between N.	Plaintiff and B.
Page is labeled	Daneau and B. Gorbovitski regarding	Gorbovitski already
"Confidential"	scheduling the meeting of B.	had these e-mails
by P. Bernstein	Gorbovitski, V. Gorfinkel and N.	document.
	Daneau at the RF SUNY.	

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Foundation 000022 – 000026	December 2011	Relevant to Request
	Extension of Genometrica project	#4 of the Subpoena
Page is labeled "AEO"	from December 2011 through June	of 9/30/2013
by P. Bernstein	2012, requesting 100% research staff	
	from Prof. Gorfinkel's Lab; budget of	
	\$350,000; PI M. Guzman; Scope of	±:
	work attached	

Table 2. Second production of documents by the RF SUNY (12/3/2013) in response to Subpoena by Mr. Koerner of 9/30/2013

398 pages bate stamped from Foundation 000065 through Foundation 000462 and from Foundation 000485 through Foundation 000490

Pages	Description of the document	Relevance to
rages	Description of the document	
		Subpoena 9/30/2011
Foundation 000065-000068.	12/16/2011	Not requested
Pages are labeled	E-mails from N. Daneau to B.	Plaintiff and B.
"Confidential"	Gorbovitski and V. Gorfinkel with	Gorbovitski already
by P. Bernstein	Notice of intent to terminate	had this document.
	ABMM's Research Agreement with	
	RF SUNY	
Foundation 000069-000098	December 2011-January 2012E-	Not requested
Pages are labeled	mail correspondence between N.	Plaintiff and B.
"Confidential"	Daneau and B. Gorbovitski regarding	Gorbovitski already
by P. Bernstein	scheduling the meeting of B.	had these e-mails
	Gorbovitski, V. Gorfinkel and N.	document.
	Daneau at the RF SUNY.	
Foundation 000099-000104	December 2011 E-mail	Relevant to Request
Pages are labeled	correspondence of N. Daneau with	#4 of the Subpoena
"Confidential"	Genometrica regarding	of 9/30/2013
by P. Bernstein	Genometrica's request to take from	
	Prof. Gorfinkel her Lab staff at	
	equipment which were 100%	
	employed on ABMM's project since	
	July 2011).	
Foundation 000105-000109	May 31, 2011.	Relevant to Request
	E-mail correspondence between N.	#9 of the Subpoena
Pages are labeled "AEO"	Daneau and V. Gorfinkel regarding	of 9/30/2013

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by P. Bernstein	reinstatement of ABMM's project.	
	(e-mail is labeled "Privileged and	
	Confidential" by N. Daneau)	
Foundation 000110-000111	December 9, 2011	Relevant to Request
	E-mail from N. Daneau to	#3 of the Subpoena
Redacted by P. Bernstein	Genometrica	of 9/30/2013.
(removed lines regarding	(e-mail is labeled "Confidential"	
patent infringement)	by N. Daneau)	Was ECF filed by
	2.7	Genometrica
Pages are labeled "AEO"		(Exhibit 16).
by P. Bernstein		
Foundation 000110-000462	Tables of expenditures on Prof.	Not Requested
	Gorfinkel's research projects	
Pages are labeled "AEO"		
by P. Bernstein		
Foundation 000485-000490	January 26, 2012	Not Requested but
	E-mail correspondence between B.	Relevant to Request
	Gorbovitski and P. Bernstein	#7 of the Subpoena
	regarding the Meeting of the week or	of 9/30/2013.
	January 16, 2012	
Pages are labeled "AEO"		Both B. Gorbovitski
by P. Bernstein	Labeled "Confidential" by B.	and Plaintiff already
	Gorbovitski	had this document